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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

ALBERTO JESUS MARTINEZ,

Defendant and Appellant.

A146383

(San Mateo County
Super. Ct. No. SC082511A)

Defendant Alberto Jesus Martinez appeals the judgment sentencing him to 32 months in prison following his no contest plea to one count of unlawful possession of ammunition with a prior strike conviction. He contends the trial court abused its discretion in denying his motion to strike his prior conviction. We affirm.

Background

Defendant was charged with possession of methamphetamine (Health & Saf. Code, §§ 11370.1, subd. (a), 11377, subd. (a)); possession of a firearm by a felon (Pen. Code,¹ § 29800, subd. (a)(1)); possession of ammunition by a felon (§ 30305, subd. (a)); and two counts of misdemeanor possession of a controlled substance (Health & Saf. Code, § 11375, subd. (b)(2)). The information also alleged a prior strike under section 1170.12, subd. (c)(1). The charges were filed after execution of a search warrant at defendant's residence uncovered "a small amount of crystal methamphetamine," two

¹ All statutory references are to the Penal Code unless otherwise noted.

controlled substances that were not prescribed to defendant, a .22-caliber rifle, and 44 rounds of ammunition of various calibers.

On June 15, 2015, defendant pled no contest to possession of ammunition by a felon and admitted the strike allegation. Under the terms of his plea, defendant was advised that although the maximum penalty for his crime was six years in prison, the court would sentence him to no more than 32 months in prison and would consider a motion to strike his prior conviction.

Prior to sentencing, defendant moved the trial court to strike his prior felony conviction pursuant to *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 (*Romero*). The trial court denied the motion and sentenced defendant, consistent with the terms of his plea, to 32 months in prison, which was the low term of 16 months doubled pursuant to section 1170.12, subdivision (c)(1).

Defendant timely filed a notice of appeal.

Discussion

Defendant contends the trial court abused its discretion in denying his *Romero* motion given his age (57 years old), the “exceptionally remote 26-year-old strike conviction, and the “nature and circumstances of [his] present offense [which] represents a low-grade felony which could have been charged as a misdemeanor.” We disagree.

Section 1385, subdivision (a) gives the trial court authority to order an action dismissed “in furtherance of justice.” In *Romero*, the California Supreme Court held that a trial court may use section 1385 to strike or vacate a prior strike for purposes of sentencing under the three strikes law, “subject, however, to strict compliance with the provisions of section 1385 and to review for abuse of discretion.” (*Romero, supra*, 13 Cal.4th at p. 504.) Thus, a trial court's “failure to dismiss or strike a prior conviction allegation is subject to review under the deferential abuse of discretion standard.” (*People v. Carmony* (2004) 33 Cal.4th 367.)

In ruling on a *Romero* motion, the trial court “must consider whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the

defendant may be deemed outside the scheme's spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies.” (*People v. Williams* (1998) 17 Cal.4th 148, 161.)

Dismissal of a strike is a departure from the sentencing norm. Therefore, in reviewing a *Romero* decision, the appellate court will not reverse for abuse of discretion unless the decision was “so irrational or arbitrary that no reasonable person could agree with it.” (*People v. Carmony, supra*, 33 Cal.4th at p. 377.) Reversal is justified where the trial court was unaware of its discretion to strike a prior strike or refused to do so for impermissible reasons. (*Id.* at p. 378.) But where the trial court, aware of its discretion, “‘balanced the relevant facts and reached an impartial decision in conformity with the spirit of the law, we shall affirm the trial court’s ruling, even if we might have ruled differently in the first instance.’ ” (*Ibid.*)

Here, it is clear that the trial judge was aware of and did exercise his discretion in denying defendant’s motion. The court explained that the decision to deny the motion was based on defendant’s “lack of remorse, complete refusal to acknowledge any wrongdoing, prior failures on probation, [and] the court’s belief that the chances of his turning his life around and leading a crime-free life being extremely slim.”

Defendant’s criminal history was properly considered by the court. The record establishes that from May 1977 to October 1984, defendant sustained six misdemeanor convictions, including convictions for carrying a concealed weapon (former § 12025, subd. (a)), battery resulting in serious bodily injury (§ 243, subd. (d)), obstructing an officer in the performance of his or her duties (§ 148), and three convictions for driving under the influence (Veh. Code, § 23152). On December 10, 1984, defendant was convicted of a strike conviction for felony assault with a deadly weapon (§ 245, subd. (a)), during which he inflicted great bodily injury (§ 12022.7). Defendant was placed on probation for three years conditioned on serving nine months in county jail. After numerous probation violations, defendant’s probation was revoked and in March 1989, his probation was terminated and he was sentenced to prison for five years. Defendant was paroled in July 1990 and suffered two parole violations before his parole

was discharged in July 1994. Between January 1985 and March 1993, while on probation and parole for his strike conviction, defendant sustained four additional misdemeanor convictions, including driving with a suspended license (Veh. Code, § 14601.2), driving under the influence (Veh. Code, § 23152), falsely representing himself to a peace officer (§ 148.9), and domestic abuse (§ 243, subd. (e)). On August 26, 1994, defendant was convicted of felony unlawful possession of a firearm (former § 12021, subd. (a)) and placed on probation. Defendant's probation was revoked in August 1995. From July 17, 1996 to June 27, 2011, defendant sustained three misdemeanor convictions: distribution of a hypodermic needle (§ 4149) and two counts of driving with a suspended license (Veh. Code, § 14601.2). Although defendant's convictions, both current and prior, are "not as serious as many felonies," they are "far from trivial." (*People v. Gaston* (1999) 74 Cal.App.4th 310, 321.) Taken as a whole, they establish a pattern of unlawfulness, which has continued essentially unabated since before his strike conviction in 1984. Defendant's performance while on probation and parole has been unsatisfactory. Finally, as the court noted, defendant demonstrated no remorse and took no responsibility for his actions at the sentencing hearing, opting instead to blame everyone else, including his attorney, for his current conviction. Given this record, we cannot say that the court abused its discretion in rejecting defendant's claim that he fell outside the spirit of the three strikes law. (See *People v. Strong* (2001) 87 Cal.App.4th 328, 331-332 ["[A] defendant who falls squarely within the [three strikes] law's letter does not take himself outside its spirit by the additional commission of a virtually uninterrupted series of nonviolent felonies and misdemeanors over a lengthy period. . . . [That] law was devised for the 'revolving door' career criminal, and was expressly intended 'to ensure longer prison sentences . . . for those who commit a felony' as long as they were previously convicted of at least one strike. . . . Extraordinary must the circumstance be by which a career criminal can be deemed to fall outside the spirit of the very statutory scheme within which he squarely falls and whose continued criminal career the law was meant to attack." (Fns. omitted.)].)

Defendant's reliance on *People v. Bishop* (1997) 56 Cal.App.4th 1245 is misplaced. In *Bishop*, the trial court struck two of the defendant's prior strike convictions

and the appellate court upheld that exercise of discretion. (*Id.* at p. 1251.) Here, however, the trial court denied defendant's motion to strike his prior conviction and, as in *Bishop*, we must uphold that decision so long as it is not irrational or arbitrary. (*Id.* at pp. 1249-1250.) Moreover, insofar as defendant relies on *Bishop* for his argument that the nature of the present crime and the remoteness of the defendant's prior violent offenses operated to mitigate his Three Strikes sentence, we note that *Bishop* predates *People v. Williams*, *supra*, 17 Cal.4th 148, and consequently did not apply the appropriate standard - whether the defendant should be deemed to fall outside the scheme's spirit.

Accordingly, we find no abuse of discretion in the denial of defendant's *Romero* motion.

Disposition

The judgment is affirmed.

Pollak, Acting P.J.

We concur:

Siggins, J.

Jenkins, J.